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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Michael Leroy Witt,

13 Defendant.
14

No. CR-23-00389-001-TUC-JCH (EJM)

ORDER

15 Before the Court are the Government's "Motion in Limine to Admit Material
16 Witnesses' Video Depositions," Doc. 103, and "Motion in Limine to Admit Defendant's
17 Prior Felony Convictions." Doc. 104. In his trial brief, Defendant stated that he had no
18 objection to the Video Deposition MIL and that the Prior Felony MIL was irrelevant
19 because Defendant did not intend to testify at trial. Doc. 118 at 1. But Defendant then filed
20 an untimely response to the Prior Convictions MIL, Doc. 128, and explained at the final
21 pretrial conference that he in fact does object to aspects of the Video Deposition MIL. *See*
22 Doc. 138 Hearing Transcript. The Court took both MILs under advisement, *see id.*, and
23 this is its resolution of them.

24 **I. Video Deposition MIL (Doc. 103).**

25 The Government seeks to admit the videotaped depositions of two unavailable
26 material witnesses. *See* Doc. 103 at 1. The Government also seeks a ruling on Defendant's
27 objections to certain portions of the depositions. *See id.* at 1, 3–4. At the final pretrial
28 conference, Defendant clarified that he also seeks a ruling on his objections to the

1 depositions. *See* Doc. 138 Hearing Transcript.

2 Videotaped depositions may be introduced at trial if the witnesses are unavailable
3 due to deportation or removal, provided they were available for cross-examination and the
4 deposition otherwise complies with the Federal Rules of Evidence. 8 U.S.C. § 1324(d).
5 Leading questions are not permitted on direct examination except as necessary to develop
6 the witness's testimony. Fed. R. Evid. 611(c).

7 First, the Court will grant in part the Government's motion to admit the videotaped
8 depositions under 8 U.S.C. § 1324(d). The witnesses are unavailable, and the deposition
9 otherwise complies with the Federal Rules of Evidence except in one respect, discussed
10 next.

11 Second, the Court will deny in part the Government's Motion because two of its
12 objected questions were impermissibly leading. The Government's Motion specifies three
13 sets of questions to which Defendant objected. Defendant's objection to the first question
14 is overruled. *See* Doc. 103 at 3:15–17. The question is not impermissibly leading.
15 Defendant's objection to the second set of questions is also overruled. *See id.* at 3:19–28.
16 These questions are primarily clarifying, not leading. But Defendant's objection to the third
17 set of questions is sustained. *See id.* at 4:3–7. The Government's questions there are
18 impermissibly leading because they supply large amounts of information and require only
19 yes or no answers. The Court will direct the Government to redact or otherwise omit the
20 testimony of Material Witness Juarez-Franco with respect to those questions.

21 **II. Prior Convictions MIL (Doc. 104).**

22 The Government seeks to admit two of Defendant's prior felony convictions for drug
23 offenses and an associated failure to appear. Doc. 104 at 1–2. Defendant was sentenced in
24 2011 to imprisonment for concurrent terms of ten years, nine months, five years, and three
25 years for these offenses. *See id.* Defendant was released on parole from the longest of these
26 convictions in July 2021. *See id.* The Government also submits that it does not oppose
27 sanitizing the convictions. *See id.* at 3.

28 A prior conviction may be used to impeach a defendant at trial if (1) the prior crime

1 is one punishable by imprisonment in excess of one year; (2) less than ten years has passed
2 since the date of conviction or release from confinement imposed for that conviction; and
3 (3) the probative value of admitting the evidence outweighs its prejudicial effect on the
4 accused. Fed. R. Evid. 609. To determine whether the probative value outweighs the
5 prejudicial effect, the Court considers: (1) the impeachment value of the prior crimes; (2)
6 the point in time of the convictions and the witness' subsequent history; (3) the similarity
7 between the past crimes and the charged crime; (4) the importance of the defendant's
8 testimony; and (5) the centrality of the credibility issue. *United States v. Browne*, 829 F.2d
9 760, 762–63 (9th Cir. 1987).

10 If Defendant takes the stand to contest his guilt, his prior convictions will be
11 admissible under the Federal Rules of Evidence and the *Browne* factors. First, Defendant's
12 convictions were punishable by more than one year. That is true even though punishment
13 for one offense was less than one year. Second, Defendant's release from confinement was
14 less than ten years ago for each of his convictions. Third, the probative value outweighs
15 the prejudicial effect because (1) prior convictions for drug offenses are probative of
16 truthfulness, (2) Defendant was arrested for his current charged crimes shortly after being
17 released from his previous convictions, (3) the past crimes and the charged crimes are
18 different, and (4) and (5) Defendant's testimony and credibility—should he take the
19 stand—will be central to his defense.

20 Defendant objects that his prior convictions are more prejudicial than probative
21 because he was convicted more than ten years ago, and because the crimes were different
22 from those charged in this case. *See* Doc. 128 at 4. Defendant asks the Court at least to
23 sanitize the convictions. *Id.* Defendant's objections are overruled because (1) a conviction
24 is admissible if the *release* is less than ten years old, and (2) the prejudicial effect is
25 *decreased*, not increased, by the dissimilarity between the charged offense and convicted
26 offenses. *See United States v. Browne*, 829 F.2d 760, 763 (9th Cir. 1987). Because the
27 prejudicial effect is decreased by dissimilarity, the Court will not sanitize the convictions.
28 But the Court will add a limiting instruction directing the jury to consider Defendant's prior

1 convictions for impeachment purposes only.

2 **III. Order**

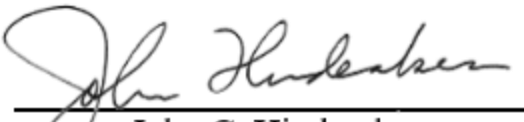
3 Accordingly,

4 **IT IS ORDERED GRANTING IN PART** the Government's Video Deposition
5 MIL (Doc. 103), consistent with this Order's reasoning and citation.

6 **IT IS FURTHER ORDERED GRANTING** the Government's Prior Felony MIL
7 (Doc. 104).

8 Dated this 2nd day of July, 2024.

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John C. Hinderaker
United States District Judge